# STATE OF MICHIGAN

# COURT OF APPEALS

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APRIL JONES,

Plaintiff-Appellee,

v

CRESTWOOD SCHOOL DISTRICT, CRESTWOOD BOARD OF EDUCATION, JILL DIAMOND, and BILL STEWART,

Defendants-Appellants.

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UNPUBLISHED
November 16, 2004

No. 249593
Wayne Circuit Court
LC No. 02-219576-NH

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendants Crestwood School District (Crestwood), Jill Diamond, and Bill Stewart appeal as of right from an order denying their motion for summary disposition pursuant to MCR 2.116(C)(7). We reverse.

Plaintiff fell off the stage in the Crestwood High School auditorium during a hypnotist's act performed at an all night party for graduating seniors in 2000. Plaintiff sued the Crestwood School District, the Crestwood Board of Education, and various individuals, including defendants Diamond and Stewart, who were teachers at the school that sponsored the event. Defendants sought summary disposition based on governmental immunity. The circuit court granted the motion as to the various individual defendants with the exception of Diamond and Stewart; determined that as to Diamond and Stewart, there were questions of fact regarding whether they were simultaneously serving a private entity (the Class of 2000); and held that there were questions of fact regarding plaintiff's public building defect claim. On appeal, defendants assert that the circuit court erred in failing to grant summary disposition on the ground of governmental immunity.

A trial court properly grants summary disposition pursuant to MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In order to survive a motion asserting governmental immunity, a plaintiff must allege facts justifying the application of an exception to this doctrine. *Id.*

MCL 691.1407(1) grants immunity from tort liability to agencies in "exercising or discharging governmental functions." *Weaver v Detroit*, 252 Mich App 239, 243; 651 NW2d 482 (2002). Courts must construe the term "governmental function" broadly, but the statutory

exceptions to the doctrine of governmental immunity, "including the public building exception, are to be narrowly construed." *Kerbersky v Northern Michigan University*, 458 Mich 525, 529; 582 NW2d 828 (1998).

In order for a claim to fall within the public building exception, a plaintiff must establish the following:

> (1) a governmental agency is involved, (2) the public building in question was open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period or failed to take action reasonably necessary to protect the public against the condition after a reasonable period. [*Kerbersky*, *supra*, 529.]

Whether a particular room is dangerous or defective must be determined in light of the uses or activities for which it is specifically assigned. *De Sanchez v Michigan*, 467 Mich 231, 237; 651 NW2d 59 (2002). The purpose of the public building exception is to "promote the maintenance of safe public buildings, not safety in public buildings." *Id.*, 238. Because of this, "where proper supervision would have offset any shortcomings in the configuration of the room, the public building exception does not apply." *Id.*, citations omitted.

In *Hickey v Zezulka* (*On Resubmission*), 439 Mich 408, 415-416; 487 NW2d 106, amended on denial of rehearing 440 Mich 1203 (1992), a prisoner in a Michigan State University holding cell committed suicide by hanging himself on a metal bracket attaching a heater to the wall of the cell. The Supreme Court found that the cell in question "was specifically intended and assigned for temporary detention." *Id.*, 425-426. Although it may have been negligent to leave a suicidal defendant in the cell, this did not "convert the heating unit and metal brackets in question into a dangerous and defective condition given the normal uses and purposes for which the cell was designed." *Id.*, 426-427.

In the instant case, the circuit court found that the auditorium had the intended use and purpose as a site for students to stage parties, and that there was a question of fact regarding whether the auditorium was defective as designed and built because it lacked sufficient means of preventing students from falling off the stage. However, the purpose of the auditorium was to provide a forum to present performances involving students. Although it may have been negligent to allow a student to fall off the stage, such negligence does not make the auditorium defective. *Hickey*, *supra*, 439 Mich 426-427. Because she asserts that her injury arose due to lack of supervision, plaintiff's claim relates to safety in, rather than the safety of, the building in question. Proper supervision would have offset any shortcomings in the configuration of the auditorium and the public building exception does not apply. *De Sanchez*, *supra*, 467 Mich 238.

Defendants Diamond and Stewart contend that the circuit court erred in denying them summary disposition under MCR 2.116(C)(7) on the grounds that a question of fact existed as to whether they were acting as agents for both the school district and a private entity, the Class of 2000. When reviewing a motion for summary disposition under this rule, courts must consider the pleadings as well as any affidavits, depositions, admissions, or documentary evidence filed or submitted by the parties. *Kerbersky*, *supra*, 529.

Under MCL 691.1407(2), employees of government agencies are immune from tort liability for injuries to persons caused by them during the course of their employment and while acting on behalf of the agency if:

> (a) the [employee] is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) the governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) the [employee's] conduct does not amount to gross negligence. [*Vargo v Sauer*, 457 Mich 49, 52, n 1; 576 NW2d 656 (1998).]

The grant of immunity applies equally to volunteers working on behalf of government agencies. MCL 691.1407(2); *Alex v Wildfong*, 460 Mich 10, 20; 594 NW2d 469 (1999).

In *Vargo*, *supra*, 70-71, the defendant doctor had staff privileges and regularly treated patients at St. Lawrence Hospital, a non-governmental entity. But he also worked as a medical professor for Michigan State University, a governmental agency entitled to sovereign immunity. *Id.*, 64-66. The defendant moved for summary disposition pursuant to MCR 2.116(C)(7) on the grounds that he was providing consultative services through the university when treating the plaintiff. *Id.*, 70. In reviewing this motion, our Supreme Court stated, "where there is a disputed question of agency, any evidence, either direct or inferential, which tends to establish an agency relationship creates a question of fact for the jury to determine." *Id.*, 71. The Court found that, notwithstanding the defendant's performance of a governmental function, a question of fact existed with regard to whether he was simultaneously operating as an agent of the private hospital, and remanded the case for trial. *Id.*, 72.

In the instant case, it is undisputed that Crestwood employed Diamond and Stewart as teachers at the time of the graduation party. Plaintiff contends that deposition testimony and documentary evidence, including the application for use of the auditorium, which was signed by defendant Diamond, demonstrated that there were genuine issues of material fact regarding whether Diamond and Stewart were also acting as agents for a non-governmental principal. Defendants assert that they were not dual agents because there was no separate entity known as the "Class of 2000" for which to be an agent.

We conclude that the court erred in denying summary disposition based on the dual agency theory. Although there was testimony that the parents of the Class of 2000 organized the event, that the parents were separate from the school, and that Diamond signed the application in behalf of the parent organizers so that the students could use the auditorium, it does not follow that Diamond and Stewart were acting as agents of a non-governmental principal. First, there is no evidence that the Class of 2000 was anything other than a loose association of parents. Second, Diamond and Stewart were at all times acting in their capacity as class sponsors. Each incoming class is assigned one or two teachers as class sponsors. Sponsors act as liaisons between the students and parents and the school, and help facilitate class activities. The sponsors remain with the class from their entry as freshmen through graduation, and are paid a stipend for being a class sponsor. It is undisputed that Diamond and Stewart were acting in their capacity as class sponsors. Neither had a child in the Class of 2000. *Vargo, supra,* is inapplicable here

where acting as liaisons and assisting the parents were assigned tasks of class sponsors, Diamond and Stewart were at all times acting as employees of a governmental agency and in the course of their employment, and their was no private, non-governmental function being simultaneously performed. *Vargo, supra* at 67-70.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot